BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In Re: State Implementation Plans; Response to Petition for Rulemaking; Restatement and Update of EPA's SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction; Final Rule	§	**Docket No. EPA-HQ-OAR-2012-0322**

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY'S PETITION FOR RECONSIDERATION AND REQUEST FOR ADMINISTRATIVE STAY

Pursuant to 5 U.S.C. § 553(e)[1] and 42 U.S.C. § 7607(d)(7)(B),[2] the Texas Commission on Environmental Quality (TCEQ) respectfully submits this Petition for Reconsideration, urging the Environmental Protection Agency (EPA) to reconsider its final rule of the Startup, Shutdown and Malfunction (SSM) State Implementation Plan (SIP) Call, captioned above and published at 80 *Federal Register* 33839 (June 12, 2015) (Final Rule). EPA is authorized, pursuant to 5 U.S.C. § 705, to "postpone the effective date of action taken by it, pending judicial review" when the agency finds that "justice so requires." Therefore, TCEQ also respectfully requests that EPA stay implementation of the Final Rule regarding the exclusion of affirmative defenses in the Texas SIP pending reconsideration.

BACKGROUND

The Clean Air Act (CAA)[3] creates a framework for cooperative state and federal programs to prevent and control air pollution,[4] giving states "primary responsibility" for prevention and control of air pollution,[5] while providing flexibility to allow for reasonable economic growth as air quality improves. Specifically, the CAA requires EPA to identify pollutants that endanger the public and to establish maximum permissible concentrations of these pollutants in ambient air.[6] These concentrations are known as the national ambient air quality standards (NAAQS).[7] States determine how to achieve

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[1] Administrative Procedure Act.
[2] Clean Air Act § 307(d)(7)(B), 42 U.S.C. § 7607(d)(7)(B).
[3] 42 U.S.C. §§ 7401 - 7671q.
[4] CAA § 101(a)(3), 42 U.S.C. § 7401(a)(3).
[5] CAA § 107(a), 42 U.S.C. § 7407(a); *Train v. NRDC*, 421 U.S. 60, 79 (1975) (EPA "is relegated by the [CAA] to a secondary role.").
[6] CAA §§ 108-109, 42 U.S.C. §§ 7408-7409.
[7] *Id.*

and maintain compliance with the NAAQS.[8] The CAA requires each state to submit, for EPA approval, a State Implementation Plan (SIP) that provides for implementation, maintenance and enforcement of the NAAQS, and specifies the manner in which the state will attain and maintain compliance with those standards.[9] Although the CAA gives EPA the authority to approve SIPs, that authority is limited to whether a state's choice of emission limitations is in compliance with the CAA, and does not give EPA the authority to question the wisdom of a state's choices.[10] In Texas, the TCEQ is the state agency authorized to implement the requirements of the CAA and develop the Texas SIP.

Each SIP must include enforceable emission limitations and other control measures, means or techniques, as well as schedules and timetables for compliance.[11] States have the flexibility to design their enforcement programs to best use their resources while still protecting the NAAQS. One component of that can be an affirmative defense, which EPA agreed is "one way to allow a State to define what constitutes an enforceable emission limitation."[12]

SIPs must also include provisions regulating the construction and modification of stationary sources of air pollutants.[13] These provisions are known as new source review (NSR). NSR permitting for stationary sources which emit air contaminants is designed to authorize emissions from routine operations and also from maintenance, startup and shutdown activities for these sources that can be planned and scheduled.

Emissions that are not planned and scheduled are violations of emissions limits and may be caused by intentional or negligent actions of the owner or operator of the source, or may be beyond the control of the owner or operator. Startups and shutdowns that are not a part of normal or routine operations and are unpredictable as to timing, as well as unplanned and unavoidable breakdowns or excursions of processes or equipment, often referred to as upsets or malfunctions, are the types of violations for which an affirmative defense has been allowed under the CAA. Despite diligent efforts, SIP-approved emission limits established in rules and permits may be exceeded under circumstances beyond the control of the operator of the source – a fact acknowledged by EPA in its defense of the approval of the TCEQ's affirmative defense rule.[14]

Since EPA's 1972 approval of Texas' SIP, Texas and EPA have applied a distinct regulatory regime to these emissions—a regime founded on the acknowledgement that it is not appropriate to enforce emission limits every time excess emissions result from

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[8] CAA §§ 101(a)(4) & 107(a), 42 U.S.C. §§ 7401(a)(4) & 7407(a).
[9] *Id.*, CAA § 110, 42 U.S.C. § 7410.
[10] *Train v. NRDC*, 421 U.S. 60, 79 (1975). *See also Union Electric Co. v. EPA*, 427 U.S. 246, 267 (1976) (Marshall, J.)("[T]he State has virtually absolute power in allocating emission limitations so long as the national standards are met . . . .").
[11] CAA § 110(a)(2)(A), 42 U.S.C. § 7410(a)(2)(A).
[12] Brief of Respondent EPA at 18, *Luminant Generation Co., LLC, et al. v. EPA*, No. 10-60934, July 12, 2011.
[13] *See* CAA § 110(a)(2)(C), 42 U.S.C. § 7410(a)(2)(C).
[14] Brief of Respondent EPA at 18 and 22, *Luminant Generation Co., LLC, et al. v. EPA*, No. 10-60934, July 12, 2011.

certain maintenance, startup, or shutdown activities.[15] This regulatory regime has evolved since 1972, with each iteration bringing a tightening of requirements. Over time, exemptions for excess emissions were narrowed and were exchanged for more restrictive affirmative defenses.[16] TCEQ adopted the affirmative defenses that are the subject of the SSM SIP Call at issue in 2005.[17]

TCEQ's affirmative defense rule is narrowly tailored and adheres to EPA's prior policy[18] such that it is entirely consistent with the CAA. It is the long-standing interpretation, upheld by the Fifth Circuit,[19] stated in these memos that TCEQ is asking EPA to reinstate as its interpretation for proper enforcement of the CAA. The affirmative defenses are limited by the numerous, stringent criteria an operator must prove before establishing the defense.[20] Key among these is the requirement that the defendant prove the emissions "did not cause or contribute to an exceedance of the [NAAQS]."[21] The TCEQ's SIP revision could not be approved if the revision "would interfere" with the NAAQS; this criterion ensures that TCEQ's rule does not interfere with the NAAQS.[22] In addition, an operator must prove, among other criteria, that (1) the emissions were properly reported; (2) the emissions could not have been prevented through planning and design; (3) the facility or its air pollution control equipment were operated consistent with good practices for minimizing emissions; (4) steps were taken to minimize the emissions; (5) emissions monitoring systems were kept in operation if possible; (6) the operator's actions during the event were documented by

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[15] *See* 37 Fed. Reg. 10,841, 10,895-98 (May 31, 1972) (approving Texas' Rule 12.2, which allows for the exemption of certain maintenance, startup, and shutdown emissions); *see also, e.g.*, Memorandum from Kathleen M. Bennett, Assistant Adm'r for Air, Noise, & Radiation, to Reg'l Adm'rs, Regions I-X, "Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions" (Sept. 28, 1982) (the "Bennett Memo"), ("EPA agrees that the imposition of a penalty for sudden and unavoidable malfunctions caused by circumstances entirely beyond the control of the owner and/or operator is not appropriate.").

[16] *See, e.g.*, 29 Tex. Reg. 118 (Jan. 2, 2004) (adopting first affirmative defense for emission events); *see also* Memorandum from Steven A. Herman, Assistant Adm'r for Enforcement & Compliance Assurance, and Robert Perciasepe, Assistant Adm'r for Air & Radiation, to Reg'l Adm'rs, Regions I - X, "State Implementation Plans (SIPs): Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown" (Sept. 19, 1999), ("EPA recognizes that imposition of a penalty for sudden and unavoidable malfunctions caused by circumstances entirely beyond the control of the owner or operator may not be appropriate * * * This policy clarifies that the states have the discretion to provide [an affirmative] defense to actions for penalties brought for excess emissions that arise during certain malfunction, startup, and shutdown episodes.")

[17] *See* 30 Tex. Reg. 8884 (Dec. 30, 2005) (codifying affirmative defense criteria at 30 Tex. Admin. Code § 101.222).

[18] Memorandum from Kathleen M. Bennett, Assistant Adm'r for Air, Noise, & Radiation, to Reg'l Adm'rs, Regions I-X, "Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions" (Sept. 28, 1982); Memorandum from Kathleen M. Bennett, to Reg'l Adm'rs, Regions I-X, "Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions" (Feb. 15, 1983); and Memorandum from Steven A. Herman, Assistant Adm'r for Enforcement & Compliance Assurance, and Robert Perciasepe, Assistant Adm'r for Air & Radiation, to Reg'l Adm'rs, Regions I - X, "State Implementation Plans (SIPs): Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown" (Sept. 19, 1999),

[19] *Luminant Generation Co. LLC v. EPA*, 714 F.3d 841 (5th Cir. 2013).

[20] *See, e.g.*, 30 Tex. Admin. Code § 101.222(b)(1)-(11), (c)(1)-(9).

[21] *See id.* § 101.222(b)(11) and (c)(9).

[22] *See* CAA § 110(*l*), 42 U.S.C. § 7410(*l*). (providing the standard for approval of SIP revisions).

contemporaneous operating logs or other relevant evidence; *and* (7) the emissions did not cause or contribute to a condition of air pollution.[23] In short, if the emissions are not excessive,[24] did not cause air pollution, *and* the operator acted appropriately to prevent and respond to such emissions, penalties will not be assessed. However, corrective orders and injunctive relief may still be imposed.[25]

The fundamental purpose of the affirmative defense rule is to create an incentive for operators to take appropriate prevention and response measures aimed at minimizing emissions.[26] TCEQ's affirmative defense rule creates a strong incentive for sources to manage their operations, *i.e.,* to self-regulate, consistent with the prescriptive terms of the criteria, because it provides regulatory certainty for operations and, in turn, investments in equipment and emissions controls.

The TCEQ's affirmative defense rule was approved by EPA as a revision to the Texas SIP in 2010,[27] and this approval was defended by EPA when challenged. EPA specifically acknowledged that because "100% compliance may not be feasible," the liability scheme in the TCEQ's rule is a way to balance the tension between the difficulty in 100% compliance with uniform numeric limits and ensuring adequate compliance and the CAA requirement for continuous compliance.[28] This is accomplished by the enforcement flexibility afforded by the affirmative defense as to penalties as long as the stringent criteria are met.

EPA's SIP approval was upheld by the Fifth Circuit.[29] The Fifth Circuit *did not* defer to EPA on interpretation of the CAA. Instead, the Court relied on a plain reading of the statute.[30] Until EPA became confused by the *NRDC* case[31] regarding whether an affirmative defense was appropriate for inclusion in rules promulgated by EPA for hazardous air pollutants under a different and distinguishable program under the CAA. [32] EPA treated the TCEQ's rule as a model for states to emulate.[33]

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[23] *See* 30 Tex. Admin. Code § 101.222(b)-(e) & (h).
[24] Importantly, the affirmative defenses are available only to emission events deemed by the Executive Director not to be "excessive." *See* 30 Tex. Admin. Code § 101.222(a), (b), (c) & (e). This is a significant restriction to the class of events for which the defenses may be asserted, and it enables the Executive Director to confine the affirmative defenses to those events for which relief from penalties may be appropriate.
[25] 30 Tex. Admin. Code § 101.222(b) - (e).
[26] *See, e.g.*, Bennett Memo, ("[B]y requiring the source to demonstrate the existence of an unavoidable malfunction . . . good maintenance procedures are indirectly encouraged . . . .").
[27] 75 Fed. Reg. 68,989 (Nov. 10, 2010).
[28] Brief of Respondent EPA at 18, *Luminant Generation Co., LLC, et al. v. EPA*, No. 10-60934, July 12, 2011.
[29] *Luminant Generation Co. LLC v. EPA*, 714 F.3d 841 (5th Cir. 2013).
[30] *Id.*, at 853 n.9 ("Additionally, the availability of the affirmative defense does not negate the district court's jurisdiction to assess civil penalties using the criteria outlined in [CAA 113(e)], or the state permitting authority's power to recover civil penalties, it simply provides a defense, under narrowly defined circumstances, if and when penalties are assessed.")
[31] *NRDC v. EPA*, 749 F.3d 1055, 1063 (D.C. Cir. 2014).
[32] CAA § 112, 42 U.S.C. § 7412.
[33] 78 Fed. Reg. 12459 at 12468 and 12470 (Feb. 22, 2013).

INTRODUCTION

A petition for rulemaking was filed by the Sierra Club with the EPA Administrator on June 30, 2011 which included interrelated requests concerning the treatment of excess emissions in state rules by sources during periods of startup or shutdown activities, or malfunctions (SSM). EPA's initial proposal responding to the petition[34] did not include a change in its long-standing interpretation of the CAA with regard to the availability of a narrowly-tailored affirmative defense for certain excess emissions[35] – those from unplanned SSM. EPA did not find any substantial inadequacy of the Texas SIP. In fact, as noted above, in its proposal, EPA referred to the Texas rule allowing for an affirmative defense for certain excess emissions as consistent with CAA requirements.[36] TCEQ submitted comments that generally supported EPA's original affirmative defense position.

Eighteen months after the close of the comment period, EPA issued a supplemental notice, proposing to additionally grant the particular issue in Sierra Club's original petition with respect to the issue of affirmative defenses in SIPs for monetary penalties for excess emissions in judicial proceedings.[37] TCEQ's timely submitted comments in response to the supplemental notice included discussions of: (1) the decades-long history of the SIP-approved affirmative defense and its predecessor forms as effective control measures in the history of the Texas SIP; (2) why EPA's proposal ignores the holding of the Fifth Circuit Court of Appeals; and (3) the SSM SIP Call illegally predetermined Texas SIP inadequacy.

After the Final Rule was published, the State of Texas and TCEQ challenged the rule by filing a Petition for Review.[38] EPA's Final Rule and statements in its brief filed October 28, 2016, contain statements that form the basis for EPA's position that were not made available by EPA for comment by interested parties, as required. When the Final Rule was promulgated and litigated, TCEQ was surprised to discover unforeseen changes that will significantly and disproportionately impact Texas. These changes form a basis for EPA to reconsider its Final Rule. In addition, EPA's recently adopted Regional Consistency Rule[39] supports reconsideration of the Final Rule.

Because EPA is not foreclosed from maintaining its long-standing prior interpretation of the CAA with regard to the use of affirmative defense as a control strategy in a SIP, TCEQ respectfully requests EPA to grant reconsideration based on the information provided below. Such reconsideration, in light of the Final Rule's significant flaws and the notice defects identified here, is warranted. Failure to convene a proceeding for reconsideration of the rule, with the same procedural rights as would have been

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[34] 78 Fed. Reg. 12459 (Feb. 22, 2013).
[35] 80 Fed. Reg. 33839, at 33881 (June 12, 2015.) EPA's long-standing policy was based on the physical limitations of the most common types of emissions control technologies, where operation at full capacity is not possible during startup and shutdown. *See, e.g., Mont. Sulphur & Chem. Co. v. EPA*, 666 F.3d 1174, 1192-93 (9th Cir. 2010).
[36] 78 Fed. Reg. 12459, at 12479, n.25 (Feb. 22, 2013).
[37] 79 Fed. Reg. 55919 (Sept. 17, 2014).
[38] Petition for Review filed with the Fifth Circuit Court of Appeals on July 10, 2015, removed to the D.C. Circuit Court of Appeals on August 28, 2015, and now part of the case styled *Walter Coke, Inc. v. EPA* (D.C. Cir., No. 15-1166).
[39] 81 Fed. Reg. 51102 (Aug. 3, 2016).

afforded had the information been available at the time the rule was proposed, would violate the notice requirements of both the Administrative Procedure Act (APA)[40] and the CAA.[41]

STANDARD OF REVIEW

Adequate notice "afford[s] interested parties a reasonable opportunity to participate in the rulemaking process."[42] The notice requirement is "designed (1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review."[43]

Two statutes require EPA to provide Texas and other interested parties adequate notice of the Final Rule and its underlying support. Section 553(e) of the APA[44] requires that "each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule." Failure to observe the basic APA procedures, if reversible error under the AP A, is reversible error under the [CAA] as well." [45]The APA allows EPA to grant this Petition without meeting any particular standard.

In addition, the CAA provides general provisions relating to administrative proceedings and judicial review. The CAA requires EPA to take the additional, more detailed step of providing a statement of the Proposed Rule's basis and purpose that includes "a summary of (A) the factual data on which the proposed rule [was] based; (B) the methodology used in obtaining the data and in analyzing the data; and (C) the major legal interpretations and policy considerations underlying the proposed rule."[46]

Specifically, § 307(d)(7)(B) provides for both mandatory and discretionary reconsideration of a rule by the EPA Administrator. Mandatory reconsideration is proper when "it was impracticable to raise [an] objection within [the public comment period] or if the grounds for such objection arose after the period for public comment . . . and if such objection is of central relevance to the outcome of the rule."

Discretionary reconsideration is also available under § 307(d)(7)(B). In *PPG Industries, Inc. v. Costle*, the D.C. Circuit noted that petitioners could comment on a new rule promulgated by EPA after remand by the court, or, alternatively, could file a petition for reconsideration directly with EPA, even though the rule at issue had been promulgated two years earlier regardless that this Petition for Review had been filed

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[40] 5 U.S.C. §§ 551-59.
[41] 42 U.S.C. §§ 7401-7700.
[42] *Am. Radio Relay League, Inc. v.* FCC, 524 F.3d 227, 236 (D.C. Cir. 2008) (internal quotation marks omitted).
[43] *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005) (citing *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.3d 506, 547 (D.C. Cir. 1983)).
[44] 5 U.S.C. §§ 551-59.
[45] *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.3d 506, 523 (D.C. Cir. 1983)).
[46] CAA § 307(d)(3); *see Small Refiner*, 705 F.2d at 518-19 (discussing the requirements of CAA § 7607(d)(3)).

and was pending in the D.C. Circuit Court of Appeals.[47] The court noted that either route would provide a reviewing court with a contemporaneous record of the agency's consideration of the issue, rather than with the "post hoc rationalizations of counsel."[48]

For example, by a January 26, 2009 directive of the incoming Obama Administration regarding the review of new and pending regulations, the EPA Administrator reviewed a number of actions taken by the previous administration in its final year. On March 10, 2009, EPA used its discretion to grant reconsideration of the March 27, 2008 final rule for the NAAQS for ozone[49] when it filed its unopposed motion requesting that the D.C. Circuit Court vacate the briefing schedule and hold the cases challenging the rule in abeyance. The basis for EPA's action was its desire to allow time for appropriate officials from the new administration to review the standards to determine whether they should be maintained, modified or otherwise reconsidered. This 2009 reconsideration was granted more than two years after the final ozone standard rule was proposed, and about one year after the final rule was published. In response to the reconsideration, EPA's proposal was published in January 2010.[50]

In addition, on January 14, 2009, EPA denied the State of New Jersey's petition for reconsideration regarding the New Source Review (NSR) Recordkeeping Rule[51] submitted February 15, 2008 (56 days after publication of the final rule). Two months later, on March 11, 2009, New Jersey submitted a second petition containing identical grounds as were included in the initial petition more than one year earlier. EPA granted it within three months on April 24, 2009 - a full 16 months after the final rule was published. Again, EPA filed its unopposed motion requesting that the D.C. Circuit Court hold the case in abeyance pending EPA proceedings.

A third example is the EPA's denial of a petition on January 14, 2009 submitted by EarthJustice regarding EPA's rule for implementation of NSR for the NAAQS for particulate matter ($PM_{2.5}$) published May 16, 2008.[52] EarthJustice filed its second petition with EPA 27 days later on February 10, 2009, which EPA granted on April 24, 2009, together with a stay pending reconsideration. The accompanying litigation was held in abeyance.

These examples of Petitions for Reconsideration granted by EPA, together with the authority granted by the APA and CAA, provide precedent for EPA granting a Petition for Reconsideration long after the effective date of the rulemaking. And, coupled with the demonstration below that that it was impossible for TCEQ to raise certain objections of central relevance to the outcome of the Final Rule during the comment period, mandate that EPA has a duty to grant TCEQ's petition for reconsideration.[53]

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[47] 659 F.2d 1239 at 1250 (D.C. Cir. 1981) ("a petition may be filed directly with EPA to interpret or amend the standard, to withdraw the Guidelines, or to specify midnight-to-midnight reporting procedures.") (citing 42 U.S.C. s 7607(d)(7) (B); 5 U.S.C. s 553(e) (1976)).
[48] *Id.*, citing *Oljato Chapter of the Navajo Tribe et al v. Train*, 515. F.2d, 654, 665-68 (D.C. Cir. 1975).
[49] Docket No. EPA-HQ-OAR-2005-0172.
[50] 75 Fed. Reg. 2938 (Jan. 19, 2010).
[51] Docket No. EPA-HQ-OAR-2001-0004 (Dec. 21, 2007).
[52] Docket NO. EPA-HQ-OAR-2003-0062).
[53] *See North Carolina v. EPA*, 531 F.3d 896, 927 (D.C. Cir 2008).

GROUNDS FOR RECONSIDERATION

I. EPA's Mischaracterization of the Texas SIP Was Not Known Until After the Close of the Public Comment Period and, Therefore, It Was impossible for TCEQ to Object Before that Time

On October 28, 2016, after the close of the public comment period for the Final Rule, EPA filed its Final Answering Brief in *Walter Coke, Inc. v. EPA*, stating that "the affirmative defense is a relatively new and narrow addition to the Texas SIP" and that "[t]he Texas SIP existed for decades without this affirmative defense."[54] This basis for evaluating the Texas affirmative defense was newly asserted in the brief, and was not part of the proposal or final action preambles or responses to public comments.

This new position reflects a fundamental misunderstanding of the role the affirmative defense plays in Texas' overall emission control strategy. It expressly counters the facts presented in comments regarding the SIP-approved affirmative defense in the Texas SIP, including the regulatory regime for treatment of certain emissions preceding the affirmative defense.[55] Public comment highlighted the significance the affirmative defense has on the Texas control strategy as a whole.[56] The CAA requires that a SIP "include enforceable emissions limitations *and other control measures, means, or techniques* . . . as may be necessary or appropriate" to meet the NAAQS and a "program to provide for the enforcement of [these] measures."[57] It also provides states have the ability to select from various options the measures they deem adequate to meet the NAAQS.[58]

Further, in its proposal, EPA reiterated its interpretation that an affirmative defense can be consistent with the CAA, stating that in order for an affirmative defense provision to be consistent with the CAA, it: (i) has to be narrowly drawn to address only those excess emissions that are unavoidable; (ii) cannot interfere with the requirement that the emission limitations apply continuously (*i.e.*, cannot provide relief from injunctive relief); and (iii) cannot interfere with the overarching requirements of the CAA, such as attaining and maintaining the NAAQS, citing to its SIP approval of the TCEQ's affirmative defense rule that met this test.[59] Importantly, EPA repeated its position that its interpretation allowing this type of affirmative defense is reasonable because it does not interfere with the overarching goals of title I of the CAA, such as attainment and maintenance of the NAAQS, and balancing it with

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[54] Brief of Respondent EPA at 110, *Walter Coke, Inc. v. EPA*, No. 15-1166 (D.C. Cir., Oct. 28, 2016).

[55] The Texas affirmative defense is for excess emissions from unplanned maintenance, startup, and shutdown (MSS) activities, and from non-excessive emissions events, which includes emissions due to upsets, which are the functional equivalent of malfunctions. 30 Tex. Admin. Code § 101.222(b) - (e).

[56] *See, e.g.*, the following in Docket No. EPA-HQ-OAR-2012-0322: TCEQ, *Comments by the Texas Commission on Environmental Quality Regarding State Implementation Plans*, at 25-33 (Nov. 5, 2014) docket item 0936; BCCA Appeal Group, *Comments on EPA's Proposed SIP Call and Related Actions* at 5-8, (Nov. 6, 2014), docket item 0958; Texas MSS Working Group, Comments at 5-8 (Nov. 6, 2014), docket item 0958.

[57] CAA § 110(a)(2), 42 U.S.C. § 7410(a)(2) (emphasis added),

[58] *See Train v. NRDC*, 421 U. S. 60, 79 (1975).

[59] 78 Fed. Reg. 12459, at 12470 (Feb. 22, 2013).

the reality that, despite best efforts of sources, technology is fallible.[60] Nothing in the Final Rule identified a technological basis to support EPA's change in policy.

Therefore, the TCEQ justifiably relied upon the fact that EPA appreciated the significant impact its SIP call would have on the control strategy for Texas. EPA's brief contradicts these facts and demonstrates EPA's lack of understanding of this control strategy. As such, the result was a fundamental inadequacy of the public comment process on the proposal and supplemental proposal.

The affirmative defense plays a critical role in, and is of central relevance to, the outcome of the Final Rule. As detailed in comments filed on the docket, the Texas affirmative defense is a key component of the state's clean air strategy and has existed, in some form, as far back as the original Texas SIP of 1972. As mentioned previously, EPA used Texas' affirmative defense rule as an example of how an affirmative defense can be properly crafted to be part of an approved SIP. Over the course of four decades, these provisions have become a key part of a comprehensive and effective strategy to control emissions. The Texas SIP originally established stringent permit and rule-based emission limits on the basis that unavoidable emissions from MSS and malfunctions could be addressed separately through reporting of emissions, and later by implementing a narrowly-tailored affirmative defense, with EPA approval of these various rules as SIP revisions.[61] Almost 45 years later, the TCEQ's Texas affirmative defense continues to be an integral part of the general-rules for the Texas air quality program.[62]

In light of EPA's misunderstanding of the central role the affirmative defense plays in the Texas SIP, TCEQ respectfully requests EPA reconsider ~~in~~ its interpretation of the permissibility of affirmative defenses with respect to unplanned MSS emissions as provided in the Texas SIP.

II. As to Texas, the Final Rule Conflicts with EPA's Recent Revisions to Its Regional Consistency Regulations

EPA's Final Rule action as to Texas' SIP conflicts with subsequent revisions to EPA's "regional consistency" regulations finalized after the close of the public comment for the Final Rule. On August 3, 2016, EPA finalized revisions to its regional consistency regulations[63] in response to a decision of the D. C. Circuit in *Nat'l Envtl. Dev. Ass'n's Clean Air Project v. EPA*.[64] As part of that rulemaking, EPA explains "under the revised regulations, it would be clear that any such adverse decision that is or has been issued would be applied to those areas or parties that are under the issuing court's jurisdiction[.]"[65] EPA further explains that the doctrine of intercircuit nonaquiescence, which EPA proposed be embedded in its regulations, is a "practice in which a decision by a federal circuit court is binding only in those areas (in this case, specific states and

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[60] *Id.*
[61] *See Comments by the Texas Commission on Environmental Quality Regarding State Implementation Plans*, at 4-11 (Nov. 5, 2014) Docket No. EPA-HQ-OAR-2012-0322, docket item 0936.
[62] 30 Tex. Admin. Code §§ 101.211(a), 101.221(e) 101.222(b) - (e), and 101.223(c).
[63] 81 Fed. Reg. 51102 (Aug. 3, 2016).
[64] 752 F.3d 999 (D. C. Cir. 2014).
[65] 80 Fed. Reg. 50250, at 50254 (Aug. 19, 2015).

the associated EPA regions) subject to the direct jurisdiction of the ruling circuit court."[66]

Under these principles, now recognized by EPA after adoption of the amendments to its regional consistency rules, which was after the close of public comment on the Final Rule, EPA's SIP call as to Texas is improper. The U.S. Court of Appeals for the Fifth Circuit, with jurisdiction over Texas, held in a binding decision that the Texas affirmative defense provisions do not "negate the district court's jurisdiction to assess civil penalties using the criteria outlined in [CAA § 113(e)] or the state permitting authority's power to recover civil penalties."[67] The Fifth Circuit's holding is directly contrary to EPA's only rationale for its SIP Call for Texas.[68] Because EPA has since adopted its regional consistency regulations, it must follow binding decisions when acting within a court's jurisdiction, and therefore reconsideration of the Final Rule is appropriate and necessary.

III. EPA is not Foreclosed from Maintaining its Long-Standing, Pre-*NRDC* Interpretation of Affirmative Defense in a SIP

EPA is not foreclosed from preserving its prior, longstanding interpretation regarding the permissibility of an affirmative defense within a SIP. EPA summarized this interpretation of the CAA before the Fifth Circuit, stating that:

> [T]he State is granted authority to determine what constitutes a violation, and to distinguish both quantitatively and qualitatively between different types of violations. This is part of the essential flexibility recognized in a regulator's ability to define enforceable emissions limitations.[69]

In the Final Rule, EPA reversed its position following the 2014 decision of the D. C. Circuit Court in *NRDC v. EPA*[70] (*NRDC*), stating "that the reasoning of the court in [*NRDC*] indicates that the states, like the EPA, have no authority in SIP provisions to alter the jurisdiction of federal courts to assess penalties for violations of CAA requirements through affirmative defense provisions."[71] EPA's original, long-standing interpretation to allow the use of affirmative defenses is the best policy because it provides states with the authority they need to implement their enforcement programs as they see fit.

TCEQ urges EPA to reconsider its recently changed interpretation in light of the significant impact this interpretation would have on the Texas SIP. For the following four reasons, neither the CAA nor the *NRDC* decision foreclose EPA from preserving its prior interpretation regarding the permissibility of affirmative defenses in a SIP.

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[66] 80 Fed. Reg. 50250, at 50252-50253 (Aug. 19, 2015).
[67] *Luminant Generation Co. LLC v. EPA*, 714 F.3d 841, 853 n.9 (5th Cir. 2013).
[68] 79 Fed. Reg. 55919, 55944-55945 (Sept. 17, 2014) and 80 Fed. Reg. 33839, 33851-33852 and 33968-33969 (June 12, 2015).
[69] Brief of Respondent EPA at 27, *Luminant Generation Co. LLC v. EPA*, 714 F.3d 841 (5th Cir. 2013).
[70] 749 F.3d 1055 (D.C. Cir. 2014).
[71] 79 Fed. Reg. 55920 at 55929.

A. EPA's pre-*NRDC* interpretation was judicially approved.

EPA's 2010 approval of the TCEQ's affirmative defense rule was upheld by the Fifth Circuit.[72] The court found that the TCEQ's SIP-approved affirmative defense rule is not inconsistent with EPA's policy guidance at that time. The TCEQ's affirmative defense is narrowly tailored to ensure that the source has made all reasonable efforts to comply with emission limitations and remain in compliance with the CAA. It serves as an incentive for avoidance of excess emissions, but also presents a high burden for reduction in or avoidance of penalties. As such, the TCEQ's affirmative defense rule is consistent with the penalty assessment criteria in CAA 113(e). *Id.* at 853. Accordingly, EPA is not constrained from returning to its long-standing prior interpretation.

B. The *NRDC* decision does not apply to control measures in SIPs.

The *NRDC* decision limits EPA's authority to include affirmative defenses only as to regulations adopted by EPA under CAA § 112.[73] In *NRDC*, the court was faced with determining whether EPA had the authority to determine the appropriateness of civil penalties through an affirmative defense in implementing CAA § 112.[74] The court held EPA lacks this authority, finding that EPA's general assignment of authority under CAA § 301(a)(1) was insufficient to overcome the specific grant of jurisdictions to the districts with respect to the appropriateness of civil penalties.[75] The court's opinion explicitly notes that it does not confront the question of whether an affirmative defense may be contained in a SIP.[76] Accordingly, *NRDC* does not apply to affirmative defenses under CAA § 110 and the court's holding has no direct preclusive effect on EPA's prior approval of them as a part of a SIP.

C. States have broad discretion to establish and enforce a program of emissions limitations and other control measures under § 110 of the CAA.

Although the *NRDC* holding explicitly withholds judgment on the approval of affirmative defenses as part of a SIP, EPA has inferred that the court's reasoning (*not* holding) in that case should extend to affirmative defenses under CAA § 110. TCEQ respectfully requests that EPA reconsider this erroneous inference.

While the *NRDC* court found that EPA had no statutory authority to determine the appropriateness of penalties, the same cannot be said for states. CAA § 110[77] grants states the authority to establish "enforceable emission limitations and other control measures, means, or techniques . . . as may be necessary or *appropriate*" and to "provide for the enforcement of [such] measures."[78]

Furthermore, while EPA's implementation of CAA § 112 was constrained by the explicit emissions standards contained within that section, states are given greater flexibility to implement emissions limitations in a SIP. As explained by the U. S. Supreme Court,

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[72] *Luminant Generation Co. LLC v. EPA*, 714 F.3d 841, 851-855 (5th Cir. 2013).
[73] 42 U.S.C. § 7412.
[74] *NRDC v. EPA*. 749 F.3d 1055, 1063 (D.C. Cir. 2014).
[75] *See* CAA §§ 113(b) and 304(a).
[76] *NRDC v. EPA*. 749 F.3d 1055, 1064, n.2 (D.C. Cir. 2014).
[77] 42 U.S.C. § 7410.
[78] CAA § 110(a)(2)(A), (C) (emphasis added).

"so long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation."[79]

D. Affirmative defenses do not alter the District Courts' jurisdiction.

Although EPA's Final Rule concedes that States have broad discretion in implementing emissions limitations and control measures,[80] it asserts that affirmative defenses exceed that discretion because they alter the jurisdiction of the district courts.[81] TCEQ requests EPA reconsider this position.

States' authority to create defenses to monetary penalties is consistent with the text of both CAA § 113(e)(1) and § 304(a). Section 304(a), which authorizes citizen suits, allows a court to "apply any appropriate civil penalties" in a citizen suit. Section 113(e)(1) provides how a court should "determin[e] the amount of any penalty to be assessed." Neither addresses how to determine whether monetary penalties are "appropriate," as distinct from the "amount" of penalties if a monetary penalty is appropriate, or, more specifically, whether a State can determine that monetary penalties are not appropriate for certain SIP violations.

The CAA grants the district court's jurisdiction over violations of an applicable standard.[82] In determining whether there has been a violation of a SIP, the district court must necessarily look to how that specific state has chosen to shape its emissions control program within the discretion granted by the CAA under § 110. The inclusion of an affirmative defense provision represents one mechanism by which states have chosen to implement their emissions control programs. When a civil action claims an alleged SIP violation, the SIP establishes the standard by which the alleged violation is judged. The court then applies the facts of the case to that standard and, where a violation is found, considers whether to award a penalty or other authorized relief as prescribed in the statute and the SIP.[83]

One Texas federal court has applied the TCEQ's affirmative defense rule as just described. In *Sierra Club v. Energy Future Holdings Corp.*, a citizen suit filed under the CAA[84] in the Western District of Texas, the Sierra Club alleged violations of certain emission limits in the Texas SIP and requested civil penalties. Defendants asserted the Texas affirmative defenses. The court did not dismiss for lack of jurisdiction, instead holding a three-day trial and entering judgment on the merits after consideration of all of the facts presented.[85] The district court's treatment of the affirmative defenses was considered with the Fifth Circuit's determination in *Luminant*[86] in the challenge to EPA's approval of the affirmative defenses in the Texas SIP, and the court found that the Texas defenses do not "negate the district court's jurisdiction to assess civil

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[79] *Train v. NRDC*, 421 U. S. 60, 79 (1975).
[80] 80 Fed. Reg. 33840 at 33848 (June 12, 2015).
[81] *Id.* at 33845.
[82] CAA §§ 113(b) and 304(a); 42 U.SC. §§ 7413(b) and 7604(a).
[83] *See* CAA §§ 113(e) and 304(a); 42 U.SC. §§ 7413(e) and 7604(a).
[84] CAA § 304; 42 U.S.C. § 7604.
[85] See *Memorandum and Order, Sierra Club v. Entergy Future Holdings Corp.*, No. 12-108, 2014 WL 2153913 (W.D. Tex., Mar. 28, 2014).
[86] *Luminant Generation Co. LLC v. EPA*, 714 F.3d 841 (5th Cir. 2013).

penalties using the criteria outlined in [CAA § 113(e)], or the state permitting authority's power to recover civil penalties, [but] simply provides a defense, under narrowly defined circumstances, if and when penalties are assessed."[87] This determination by the Fifth Circuit is not only binding, as recognized by EPA in its recent regional consistency rulemaking, but it is also consistent with the State's authority under CAA § 110.

RELIEF REQUESTED

For the forgoing reasons, TCEQ respectfully requests the Administrator promptly grant this Petition, initiate a proceeding for reconsideration of the issues raised in this Petition under the APA or the CAA, and stay implementation of the Final Rule regarding the exclusion of affirmative defenses in the Texas SIP, pending reconsideration.

March 15, 2017

Respectfully submitted,

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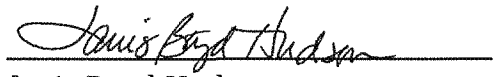
Chairman
Texas Commission on Environmental Quality

[87] *Id.*, at 853, n. 9.

CERTIFICATE OF SERVICE

I certify that a copy of the Texas Commission on Environmental Quality's Petition for Reconsideration and Request for Administrative Stay was served on the following persons via hand delivery, facsimile, electronic mail, first class mail, or certified mail on March 15, 2017.



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